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In the Supreme Court of the United States

OCTOBER TERM, 1982

CHILDREN OF THE CHIPPEWA, OTTAWA AND POTAWATOMY TRIBES, *et. al.*,
Petitioners,

VS.

REGENTS OF THE UNIVERSITY OF MICHIGAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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QUESTIONS PRESENTED

The native tribes of Michigan seek educational rights promised in exchange for 1,920 acres of reservation land conveyed to the University of Michigan.

I.

Can Indian reservation land, conveyed pursuant to a treaty to a then (circa 1817) agency of the federal government (a college established by a federal territory) be the subject of an educational trust?

II.

When a trust is established by both treaty and federal territorial statute, can it be ignored by the subsequent state government created out of the federal territory?

III.

Should a state be permitted to construe the provision of a treaty as a "gift" to the state college when such construction is to the detriment of the Indians who owned the land?

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PARTIES TO THE PROCEEDING

Plaintiff-Petitioners

Paul J. Johnson
Bay Mills Indian Community Council
Cheboygan Indians United
Committee for Action of Rural Indians
Consolidated Bahweting Ojibwas, Inc.
Gogebic Ontonagon Non-Reservation Indian Council
Grand Traverse Area Indian Center
Grand River Band of Ottawa Nations, Inc.
Hannahville Indian Community Council
Huron Potawatomi, Inc.
Indians of North America Foundation, Inc.
Katakitegoning Indian Community Council
Keweenaw Bay Indian Community Council
Inter-Tribal Councils of Michigan
Les Cheneaux Tribe, Inc.
Leelanau Indians, Inc.
Northern Michigan Ottawa Foundation
Nadwegweyamsheing, Inc.
Original Band of Sault Ste Marie Indians
Potawatomi Indians of Michigan
Potawatomi Indian Nation, Inc.
Saginaw Chippewa Tribe
Thornapple Band of Ottawas
Tri-County American Indians, Inc.
Tri-County Indian Center
Organized Native Americans of the Marquette Area

Defendant-Respondent

Regents of the University of Michigan, an agency of the State of Michigan

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REGENTS OF THE UNIVERSITY OF MICHIGAN,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

OPINIONS BELOW

The order of the Michigan Supreme Court denying application for leave to appeal is reported at 414 Mich 870 (1982). It is set forth in full in the Appendix beginning at page 1a. The opinion of the Michigan Court of Appeals is reported at 104 Mich App 482 (1981) and 305 NW2d 522 and is set forth in full in the Appendix beginning at page 2a. The opinion of the Washtenaw Circuit (Ann Arbor) trial court is reported at 104 Mich App 482, 493 and 305 NW2d 522 and is set forth in full in the Appendix beginning at page 13a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3). A right under a treaty of the United States is claimed and the state courts of Michigan have declined to enforce the right.

The Michigan Supreme Court's order denying application for leave to appeal was entered on August 10, 1982, and a copy thereof is set forth in the Appendix at page 1a. The opinion of the Michigan Court of Appeals was issued on January 26, 1981, and a copy thereof is set forth in the Appendix at page 2a. The opinion of the trial court was issued on February 28, 1979, and a copy thereof is set forth in the Appendix at page 13a.

The Constitution provides that "The Judicial Power shall extend to all cases, in law and equity, arising under ... Treaties made, or which shall be made ..." Art III Section 2. The Constitution further provides that "This Constitution ... and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." Art VI.

The Treaty of Detroit of 1807 provides in Article 6 that certain sections of land are reserved to the Indians as reservations for their villages. Article 6 is set forth at page 34a of the Appendix. 7 Stat 105; 2 Kappler 92.

The Treaty of Fort Meigs of 1817 provides in Article 16 that the Indian village reservations be conveyed to the "college at Detroit" because the Indians were then "believing they may wish some of their children hereafter educated." Article 16 is set forth at page 34a of the Appendix. 7 Stat 160; 2 Kappler 145.

The Act of the Government of Michigan Territory of 1821 to establish the "University of Michigan" provided in Section 8 that "the three sections of land, granted to the College of Detroit by the treaty of Fort Meigs ... [be] ... subject, nevertheless, to the uses, trusts and purposes for which the same property was granted, given, conveyed or promised." The 1821 Territorial Act is set forth at page 35a of the Appendix. 1 Michigan Territory Laws 879 (An Act for the establishment in the City of Detroit, an University, April 30, 1821).

CONSTITUTIONAL PROVISIONS, TREATIES AND MICHIGAN TERRITORY STATUTE

Appended to the Petition beginning at page 34a of the Appendix are the following relevant constitutional provisions, treaties and Michigan Territory statute: Article III, Section 2 and Article VI of the United States Constitution (in part); Article 6 of the Treaty of Detroit of 1807; Article 16 of the Treaty of Fort Meigs; and An Act for the establishment in the City of Detroit, an University, April 30, 1821 (1 Michigan Territory Laws 879).

STATEMENT OF THE CASE

In the 1807 Treaty of Detroit the Chippewa, Ottawa and Potawatomy Indians sold a large portion of southeast Michigan to the United States. Three parcels of land totalling 1,920 acres were not sold; these lands were "reservations." Evidence adduced at trial showed that these particular reservations were Indian villages and salt source sites.

Prior to the War of 1812 Father Gabriel Richard operated a school for Indian children near Detroit. Father Richard was a

member of the Sulpician Order whose primary mission was the education of Indians. When the school was shut down by the federal government Father Richard wrote to President Jefferson that:

> I have not given up
> and I will not give up
> the design of instructing Indian children.
> I am certain that with constancy we shall succeed.

Father Richard was highly regarded and trusted by the Indians.

The Indians fought on the side of the British during the War of 1812 which, in Michigan Territory, did not conclude until 1815. The Michigan Indians were not friendly to the United States government, its territorial employees or its citizens.

In August of 1817 the University of Michigania was established by Michigan Territorial Act.

In September of 1817 Father Richard was appointed vice president of the University of Michigania.

On September 29, 1817 the Treaty of Fort Meigs was signed by plaintiffs' forefathers and by Territorial Governor Lewis Cass who also served as president of the board of trustees of the University of Michigania.

Article 16 of the Treaty of 1817 provides:

> Some of the Ottawa, Chippewa and Potawatomy tribes being attached to the Catholick religion and believing they may wish some of their children hereafter educated do grant . . . to the corporation of the College at Detroit for the use of the said college to be retained or sold . . . three sections of land . . .

The full text of Article 16 is set forth in Appendix at page 34a.

In 1821 the University of Michigania was re-structured by Territorial Statute and its name changed to the "University of Michigan." The Territorial Act provides in Section 8:

> And be it enacted, That the three sections of land, granted to the College of Detroit by the Treaty of Fort Meigs . . . shall be vested in the said trustees, agreeably to the terms of the grant . . . subject, nevertheless, to the uses, trusts and purposes for which the same property was granted, given, conveyed or promised.

The full text of the 1821 statute is set forth in Appendix at page 35a.

On May 15, 1824 by Letters Patent the Indian land was conveyed to the "University of Michigan formerly the Corporation of the College of Detroit" pursuant to "the sixteenth article of a Treaty, made and concluded on the twenty ninth day of September one thousand eight hundred and seventeen."

After receiving the Indian reservation lands the University of Michigan sold them.

Fifty years later University president James Burrill Angell delivered a "Commemorative Oration" and said that the money the University realized from the sale of the Indian lands were "surpassing in ultimate value the gifts for which the names of Nicholas Brown and Elihu Yale and John Harvard were bestowed on colleges in New England."

President Angell went on to say that:

> There is something pathetic in this gift of the Indians who were even then so rapidly fading away.

> They doubtless hoped that some of their descendants might attain to the knowledge which the white man learned in his schools and which gave him such wonderful power and skill. Their hope has never been realized, so far as I know, by the education of any full-blooded Indian at the University.

After selling the land the University of Michigan failed to apply the proceeds from the sale to the education of Indian children.

The courts of Michigan acted in a parochial manner to deprive these plaintiffs of their patrimony. They held that, even after a decade of warfare, the Indians conveyed the Article 16 lands as a "gift." The courts below ignored the admonitions of this Court in the construction and interpretation of Indian treaties.

The issue centers upon Indian reservation land and the right of the Indians to convey the land in trust to a then territorial college (which, upon statehood in 1837, became a state college) for the educational benefit of Indian children.

Article 16 of the Treaty of Fort Meigs of 1817 conveyed the Indian reservation land that had been reserved to the Indians for their villages in the Treaty of Detroit of 1807. Article 16 uses language that, coupled with the conveyance of the land, created an express trust. Plaintiffs concede that the express trust is not drafted with the precision that a modern day trust lawyer might draft such a document; however, plaintiffs contend that the evidence adduced at trial fully supports an express trust.

It has been claimed that the word "wish" in Article 16 is precatory; yet the evidence is that in the idiom of the day an Indian leader would use the word "wish" in a commanding manner that was not precatory. The speech of Chief Noonday

of the Grand River band of the Ottawa on January 11, 1827 is illustrative:

> I wish our children to be instructed like the whites, then these educated children will become capable of assisting us in the transaction of business with white people.

A few years after the treating at Fort Meigs, the Michigan Territorial Government made further evidence of the intention of both parties to create a trust when it enacted the 1821 University of Michigan Act that speaks directly of the Indian reservation lands in Article 8.

Both the treaties of 1807 and 1817 were ratified by the Senate. Acting upon commission of the Congress, Richard Peters compiled and offered interpretation of the various Indian treaties in the early 1840's.

This is Peters' interpretation of Article 16:

"GRANT FOR THE EDUCATION
OF INDIAN CHILDREN"

Peters' conclusion concerning Article 16 was published in 1846, less than 30 years after the Treaty was signed. Peters, the Reporter to John Marshall and publisher of 16 volumes of United States Reports, was of renown stature in the jurisprudence of his time. In compiling the Statutes at Large he worked under the authority of Congress as its "reporter." His conclusion was that the intent of Article 16 was that Indian children would be educated.

Biographical information on Peters' work is contained in Dunne, "Early Court Reporters," Yearbook of the Supreme Court Historical Society, 1976, pp 64-67; 5 History of the Supreme Court of the United States (Oliver Wendell Holmes Devise), MacMillan, 1974, pp 298-306.

The Michigan court has said on the one hand that:

> Where there is a writing in existence evidencing the trust, we have not required that all "t's" should be crossed or all "i's" dotted. *Saxon* v *Howey*, 247 Mich 508, 512, 226 NW 228 (1929)

However, in the instant case the Michigan courts have permitted a nit-picky interpretation of the law of trusts to prevail so as to defeat the claim of the Indian children.

Massachusetts has long been the seat of study of the American law of trusts; in its law schools, its banking houses and its courts. American jurists have long considered the Supreme Judicial Council of Massachusetts as the leading American appellate court in the area of trust law. In 1954 the S.J.C. held that a writing on an envelope containing deeds was sufficient to constitute an express trust:

> The delivery of the envelope and its contents to the plaintiff in the attending circumstances was a sufficient declaration of an express trust in the land . . . Neither state [Massachusetts and Florida] requires any particular form of words to create a trust in realty. [citing cases] . . . whether one [a trust] exists is to be ascertained from the intention of the parties as manifested by the words used and the circumstances of the particular case . . . There is no prescribed form for the declaration of a trust; whatever evinces the intention of the party that the property of which he is the legal owner shall beneficially be another's is sufficient. *Herman* v *Edington*, 331 Mass 310, 314-315, 118 NE2d 865, 868 (1954)

Plaintiffs asserted, in the alternate, that all the facts exist for equity to construct a trust. In the alternate, the courts below should have imposed a constructive trust and required that funding be provided for Indian education at the university.

The Manhattan Indians are reputed to have sold their island for $24, therefore no constructive trust could be imposed by equity in their favor. The record in the instant case is clear and uncontroverted on the issue of consideration: no money or consideration of any sort was ever paid to the Michigan Indians for their reservation lands taken by the defendant. On October 3, 1817 the *Detroit Gazette* reported that the Article 16 lands were "to be selected out of tracts reserved to the Indians by the treaty of Detroit, and is consequently among the most valuable lands in the Territory." This is a situation where equity should impose a trust.

The constructive trust, as it was put by Mr. Justice Cardozo, "is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not, in good conscience, retain the beneficial interest, equity converts him into a trustee." *Beatty* v *Guggenheim Exploration Co.*, 225 NY 380, 386; 122 NE 378 (1919).

In negotiating treaties prior to 1836 the Indians acted toward the treaty commissioners in the manner that a child might toward a parent. Evidence adduced at trial of the instant case was:

> That is the way they [the Indians] characterized themselves in dealing with the people who were the [treaty] Commissioners. "We are the children and you are our father." They observed this as a personal relationship. This is the language they used.

The photocopy of the Treaty from the National Archives shows that the Indians evidenced their assent to the treaty by marking "X"s and making tiny drawings of animals and birds. They were unlettered. The Michigan courts are well aware of the undue advantage that has been taken of the native people of Michigan. In 1876 the Michigan Supreme

Court opined that "Shawboose can neither read nor write, and was helpless in the hands of these parties." *Raymond* v *Shawboose*, 34 Mich 142, 149 (1876). In 1889 it said that "It is undoubtedly true that Indians may be easily led to make bad bargains, and, when made, usually stick to them." *Kobogum* v *Jackson Iron Co*, 76 Mich 498, 506; 43 NW 602 (1889).

It is interesting to note that Michigan does recognize that a scholarship fund can be established to benefit a specific ethnic group. *Knights of Equity* v *University of Detroit*, 359 Mich 235; 102 NW2d 463 (1960). That case concerned scholarships to benefit Irish children; it was held that the University obligation was limited to the income generated by the trust assets. Plaintiffs seek nothing more in the instant case.

However, unlike their treatment of the Irish twenty years ago, the contemporary Michigan courts rationalized to their satisfaction the failure of the University to live up to its trust obligations by the simple device of labeling the transaction a "gift."

The historical personage the Michigan courts selected as the focus of the "gift" was Father Gabriel Richard.

Father Gabriel Richard operated a school for Indian children that was shut-down during the War of 1812. But Father was undaunted in his quest to educate Indians. He wrote that:

> God knows how may projects great and small go through my head of schools and missions for the Indians . . . My spirit, my imagination, and still more my heart is full of plans, designs, projects and conceptions which I should call extravagant, and which always remain sterile, they abort or they die at birth.

In a very unfair and unjust reading of history the courts below held that since the Indians loved Father Richard and he

was connected with the university, therefore the Indians intended a "gift" of their village reservation lands to the university. Thus the defendant escaped an obligation to do equity to these plaintiffs.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Michigan courts have decided an important question of federal Indian treaty law which should be settled by this Court. The Treaty of Fort Meigs of 1817 is the *only* treaty of the 388 Indian treaties on record that mentions *any* college. In no other Indian treaty is there any mention whatsoever of any college.

The trial court said at 104 Mich App 496 that "This case is especially difficult because this Court has to leap backward in time some one hundred sixty-two years to figure what happened."

Rather than contemplating the rules for leaping backwards, this Court has upon many occasion described the judicial analysis that ought to be applied to Indian treaties.

> The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people.
>
> The language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of susceptible of a more extending meaning. —*Choate* v *Trapp*, 224 US 665, 675; 32 S Ct 565; 56 L Ed 941 (1911)

This was the historic position of Chief Justice Marshall. In the instant case Marshall's reporter, Richard Peters, had no difficulty whatsoever in observing in Article 16 that the drafter

had placed therein words "made use of susceptible of a more extending meaning."

Plaintiffs ask this Court to consider the human motivations that were expressed in Article 16 and the 1821 Michigan Territorial Act; plaintiffs seek justice for the reasonable expectations that were induced in their forefathers and were recorded in those solemn writings.

The title of the Chippewa, Ottawa and Potawatomy peoples to their Michigan lands was the most ancient, pure and absolute known to man; its validity confirmed by possession and enjoyment antecedent to all pretense of claim by the Regents of the University of Michigan.

The consent of the Indian peoples at Fort Meigs in 1817 was indispensable to a transfer of their title to the University. The Indians fulfilled their part of the bargain: the University got the land. The University has not fulfilled its part: the Indian children did not receive the education.

Plaintiffs believe the opinions of the courts below are based upon a misapprehension of history and the law. This Court is in a unique position to do justice by examining the facts and doing equity. Gabriel Richard wrote:

> The Indians seem desirous to have their children educated . . . it is contemplated to admit them in our Seminary together with the White children. By living under the same roof, Eating the same bread, and receiving the same Instruction, they shall learn that they are all Brothers, and believe to be one and same people and one family.

It is haunting to read those words, penned so many years ago, because they remind us that the power of the ideas expressed in *Brown* v *Board of Education*, were not conceived in the post World War II era. The roots of those ideas are buried deeply in our history.

On September 29, 1817 the sachems, chiefs and warriors of the Chippewa, Ottawa and Potawatomy tribes tried to provide for their children's education in the manner that appeared to them most likely to insure the spoken promise. For who could possibly believe that these Indian men in 1817 would give away their ancient tribal village lands and not protect their children?

The children are the natural object of bounty of their forefathers who signed the treaty; not some then little known month-old college at Detroit.

This case is not concerned with the legal rights of a single individual; it is concerned with the equitable rights of an entire class of people who are the original people of Michigan.

The class of Michigainers that bring this case have the highest rate of unemployment, of illiteracy, of alcoholism and the lowest standard of housing, health care and income of any class of people in the state.

Their adversary is the second oldest corporation in Michigan, founded in 1817. Then a penniless institution, it received 1,920 acres of Indian reservation land when it was four weeks old. This land was, in the words of the 1821 statute, "subject nevertheless to the uses, trusts and purposes for which it was conveyed." Today that then penniless college enjoys an annual budget that exceeds one half billion dollars.

CONCLUSION

Article 16 of the 1817 Treaty effected a taking of tribal property by the University of Michigan, property which had been set aside for the exclusive occupation of the Chippewa, Ottawa and Potawatomy by the 1807 Treaty. That taking implied an obligation on the part of the university to make just

compensation to the Indians in the form of education benefits since no money was paid to the Indians for their tribal reservation lands. The courts of Michigan have erred in favor of the university. Your plaintiffs pray this Honorable Court grant their prayer and issue the writ of certiorari so that justice may be done.

Respectfully submitted,

Elmer E. White
Attorney for Petitioners